LOYENS & LOEFF

LAW & TAX

EU **Tax Law**
Highlights of 2023

In the course of 2023 there have been several important developments in the field of EU tax law. This annual edition of the EU Tax Alert provides an overview of those developments.

LOYENS LOEFF

Introduction

In this publication, we look back at the most important tax law developments within the European Union during 2023. We discuss, amongst other things, relevant legislation adopted at the EU level, case law of the Court of Justice of the European Union (CJ) and Opinions of its Advocate Generals (AG). Furthermore, we set out important tax plans and developments of the European Commission (EC), the Council of the European Union (Council) and the European Parliament (EP).

Highlights in this edition include, among others:
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- EU Commission launches BEFIT: framework for an EU corporate tax system
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- EU Commission proposes Directive for Head Office Tax system (HOT) for micro, small and medium-sized enterprises
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- CJ judgment on VAT fixed establishment concept in case of exclusive toll manufacturer (Cabot Plastics, C-232/22)
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- European Parliament and Council adopt the Carbon Border Adjustment Mechanism (CBAM) Regulation
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- CJ judgment on the primary rules of origin where the production of goods involves more than one country or territory (*Stappert Deutschland GmbH*, C-210/22)
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If you are interested in other tax law developments within the European Union during 2023, please see the editions 199-203 of the EU Tax Alert available in our website.

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Direct Taxation

DAC8 adopted and published in Official Journal of the EU

On 17 October 2023, the Council of the European Union adopted by unanimity the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 8). This Directive, introduced an EU standardized tax information reporting and exchange framework for crypto-assets and e-money, as well as other rules to expand administrative cooperation between Member States' tax administrations (e.g., extends the scope of AEoI to include information from non-custodial dividends and advance cross-border tax rulings for high-net-worth individuals, expands the information to be reported under CRS/DAC2 and includes other adjustments, incorporates the exemption for lawyers bound by the legal professional privilege from notifying other intermediaries of their DAC6 reporting obligations, etc.).

The formal adoption by the Council is the final step in DAC8's legislative process. The Directive was published in the Official Journal on 24 October 2023 and became effective on 13 November 2023. EU Member States are required to transpose the main rules of DAC8 into national law by 31 December 2025, and the new provisions will apply as of 1 January 2026. However, DAC8 provisions related to identification services should be transposed into national law by 1 January 2024 and apply as of 1 January 2025, whereas the provisions related to TIN validation should be transposed into national law by 31 December 2027 and apply as of 1 January 2028.

Five Member States' elect to delay the application of Pillar Two's IIR and UTPR

On 12 December 2023, the Official Journal of the EU included a notice of the European Commission regarding the election made by five Member States' to delay the application of the Income Inclusion Rule (IIR) and the Undertaxed Profits Rule (UTPR) under Article 50 of the Pillar Two Directive. Article 50(1) of the Pillar Two Directive provides for an election to delay the application of the IIR and the UTPR that can be made by Member States, 'in which no more than twelve ultimate parent entities of groups within the scope of this Directive are located' for six consecutive fiscal years beginning from 31 December 2023. Member States that make such election must notify the Commission by 31 December 2023.

As at 12 December 2023, the following Member States have notified the Commission of their intention to elect for a delayed application of the IIR and UTPR in accordance with the aforementioned provision: (i) Estonia, (ii) Latvia, (iii) Lithuania, (iv) Malta and (v) Slovakia.

Commission adopts DAC7 Implementing Regulation for exchange of information with third countries

On 13 April 2023, the European Commission adopted an implementing regulation regarding the assessment and determination of information equivalence in an agreement between a non-EU jurisdiction and a Member State under the seventh version of the EU Directive on Administrative Cooperation (DAC7). The regulation establishes criteria for assessing whether the national law of a non-EU jurisdiction and an agreement between competent authorities ensure that information automatically received by a Member State is equivalent to that required under DAC7 reporting rules for digital platforms. The criteria are: to assess relevant definitions, due diligence procedures, reporting requirements, and administrative procedures, and that the assessment is performed by the European Commission. If the criteria are met, the information exchanged will be deemed DAC7 equivalent and non-EU platform operators will be released from the obligation to register in an EU Member State to comply with their DAC7 reporting obligations.

This Regulation has been recently applied to specific agreements signed between the competent authorities of the United Kingdom and New Zealand and several EU Member States by means of Commission Implementing Regulations (EU) 2023/2389 of 29 September 2023 and 2023/2693 of 30 November 2023 respectively.

EU Commission launches BEFIT: framework for an EU corporate tax system

On 12 September 2023, the European Commission (EC) proposed a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT). The BEFIT proposal was announced earlier and contains a common corporate income tax framework for groups active in the EU. BEFIT lays down rules for calculating an aggregated tax base for members of a BEFIT group and the allocation of the tax base between (eligible) BEFIT group members.

The proposal is strongly connected to the Pillar 2 Directive, as well as to the complementary Council

Directive proposal establishing a Head Office Tax system for micro, small and medium-sized enterprises (SMEs) and the Council Directive proposal on Transfer Pricing, submitted by the EC on the same date (see below).

If adopted, Member States must implement BEFIT by 1 January 2028 and apply its provisions from 1 July 2028. BEFIT will have a major impact on the tax calculation and administration of multinational groups with a European footprint. For more information of the main characteristics of BEFIT, please see our web post on such proposal.

EU Commission proposes harmonized TP rules and 'fast-track' procedure

As part of the BEFIT package, the EC presented, on 12 September 2023, a legislative proposal for a Council Directive that integrates key Transfer Pricing (TP) principles into EU law.

Based on the proposal, all Member States must apply the arm's length principle for corporate income tax purposes in accordance with the OECD TP Guidelines and are bound to specific provisions in respect of corresponding or compensating adjustments, including a 'fast-track' procedure to resolve double taxation. The proposal also includes the obligation to apply the most appropriate TP method and the burden of proof in relation to the application of other non-prescribed methods. In this regard, the Directive proposal seems to provide stricter rules than those laid down in the OECD TP Guidelines and in many Members States.

The proposal harmonizes both TP principles and documentation requirements within the EU, which will impact the TP approach of MNEs across all Member States. If adopted, Member States must apply the provisions as from 1 January 2026.

For more information about the most important aspects of the proposed TP Directive and its implications for taxpayers, please see our web post on such development.

EU Commission proposes Directive for Head Office Tax system (HOT) for micro, small and medium-sized enterprises

As part of the BEFIT package, the EC presented, on 12 September 2023, a legislative proposal for a Council Directive establishing a 'Head Office Tax system' for micro, small and medium-sized enterprises and amending Directive 2011/16/EU (DAC).

The proposed Directive provides micro, small and medium-sized enterprises (SMEs) at the initial stages of expansion with an option to compute the taxable result of their permanent establishments (PEs) in other Member States, on the basis of the rules of the Member State where the Head Office (i.e., headquarters of the SME) is resident for tax purposes. This simplified approach, which is referred to as 'Head Office Taxation' (HOT), does not touch upon applicable tax rates and social security rules (which would remain those of the Member States where the PEs are located), nor does it affect existing bilateral tax treaties.

SMEs in the scope of this proposed Directive are those defined under the Accounting Directive (Directive 2013/34/EU) which operate exclusively through PEs in one or more Member State. SME groups with subsidiaries and shipping activities covered by a tonnage tax regime are excluded from the scope of the Directive.

The application of this new regime is optional and thus, left to the discretion of eligible SMEs. The option will last for five years. Both its granting and renewal are, however, strictly confined by eligibility requirements aimed to address potential risks of circumvention of the rules.

In addition to its substantive simplification rules, the proposed Directive also provides significant procedural simplification by means of a 'one-stop-shop' (OSS), whereby the tax filing, tax assessments and the collection of the tax due by the PE(s) are dealt with through one single tax authority (named 'filing authority') (i.e. the tax authority in the Member State of the head office). This would enable in-scope SMEs to interact only with the tax administration of the Member State of their head office both for the procedure to opt in and for filing obligations and paying taxes. Under the proposal, the 'filing entity' for all PEs will be the head office of the SME. Tax audits, appeals and dispute resolution procedures would continue to be handled in accordance with the procedural rules of the respective Member States.

Last but not least, the HOT Directive proposal includes certain amendments to Directive 2011/16/EU (DAC) to ensure a timely and streamlined exchange of information between the relevant tax authorities and, in this way, answer the needs and simplification purpose aimed at by the HOT Directive proposal.

The HOT Directive proposal is designed as a complementary measure to BEFIT, which is primarily aimed at large groups operating across the EU. The HOT Directive proposal simplifies rules for SMEs during their early stages of expansion. If SMEs successfully expand and grow, they may outgrow the scope of the HOT rules but then, they will be able to opt into BEFIT. In this way, the EC considers that smaller businesses will be able to choose the best option for their own needs throughout their lifecycle.

For more information about the most important aspects of the proposed please see here.

EU Commission presents Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER)

On 19 June 2023, the European Commission proposed a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER). This Directive introduces new rules to enhance withholding tax procedures in the European Union (EU), aiming to improve efficiency, security, and fairness for investors, financial intermediaries, and tax administrations. The proposal is part of the Commission's efforts to modernize business taxation and promote cross-border investment within the EU.

Withholding tax refers to situations where investors in one EU Member State are liable to pay tax on earnings from another Member State. To avoid double taxation, many countries have signed double taxation treaties, allowing investors to claim refunds for excess taxes paid. However, the current refund procedures are time-consuming and burdensome, which discourages cross-border investment. Additionally, refund procedures have been subject to abuse, resulting in significant tax losses.

The measures proposed as part of this Directive include the introduction of: (i) A common EU digital tax residence certificate to streamline refund procedures, enabling investors to reclaim multiple refunds with one certificate; (ii) Two fast-track procedures, namely 'relief at source' and 'quick refund,' which will expedite the refund process and harmonize it across the EU; (iii) A standardized reporting obligation, which will aid tax administrations in verifying eligibility for reduced rates and detecting potential abuse; and (iv) A national register of certified financial intermediaries, which will facilitate faster processing of refund requests and prevent double taxation.

If adopted by Member States, the rules are expected to take effect on 1 January 2027. For more information on the FASTER proposal, please consult our Tax Flash on this subject.

EU Commission publishes Frequently Asked Questions (FAQs) on Pillar Two Directive

On 22 December 2023, the EU Commission published FAQs on the Pillar Two Directive. This document is the outcome of informal reflections of the Commission Services on the suggested correct interpretation and transposition of some of Pillar Two rules. In addition, the webpage of the EU Commission has been updated to include: (i) The Council and Commission Statements of 9 November 2023 on the Two-pillar solution to address the tax challenges arising from the digitalisation of the economy; (ii) The consent letters from Cyprus authorities on the qualifying international agreements referred to under art. 32 of the Directive; and (iii) The Commission Notice on Election to delay application of the IIR and UTPR under Article 50 of the Pillar Two Directive.

CJ judgment on the compatibility of German tax rules for non-resident closed-end real estate funds with the free movement of capital (*L Fund*, C-537/20)

On 27 April 2023, the CJ delivered its judgment in the case *L Fund* (C-537/20). The case deals with the issue of whether the German corporate income tax, which applies to non-resident closed-end real estate funds, is in line with the free movement of capital.

The case involved a Luxembourg closed-end fund (L Fund), which generated revenue by renting and selling real estate properties in Germany. The fund had two institutional investors, both of which were located outside Germany and had no central administration or registered office in that country. According to German tax law, closed-end real estate funds based in Germany with exclusively non-resident investors are exempt from paying corporate income tax at the level of the fund. In these cases, the immovable property income is attributed directly to the non-resident investors and the relevant tax is withheld by the German fund. Differently, non-resident closed-end real estate funds are not exempt from German corporate tax in relation to their immovable property income, which is taxable at the fund level. L Fund considered that this treatment was not in line with the free movement of capital.

In its judgment, the CJ first evaluated whether the distinction in treatment made by the aforementioned German law was linked to situations that are objectively comparable. The CJ found that the sole criterion of distinction in the German law was the tax residency of the fund, as the corporate income tax exemption and the obligation to withhold tax on behalf of non-resident investors only applied to domestic funds. Thus, the Court concluded that resident and non-resident closed-end real estate funds were in a comparable situation.

Next, the CJ analysed the justifications put forward by the German government to defend the rules in question. Such alleged justifications referred to: (i) the need to ensure the coherence of the German tax system, and (ii) the need to ensure a balanced allocation of taxing rights. First, the Court stated that justifying a tax benefit on the grounds of tax system coherence required a direct correlation between such benefit and its offsetting with a relevant tax charge. The CJ left to the referring Court the task of determining whether such correlation exists or not. In any case, and regardless of whether such a direct link exists, the CJ found that the measure in question was disproportionate because a less restrictive measure was available. Pursuant to the Court, such a measure would be to exempt foreign closed-end real estate funds, as long as the investors pay a tax equal to that paid by investors in a German closed-end real estate fund. Furthermore, the CJ held that the rules in question might not meet the objective of the legislation, as German investors in foreign closed-end real estate funds may be subject to double taxation, with property income taxed initially at the fund level, followed by taxation at the investor level.

Second, the CJ dismissed the justification of ensuring a balanced allocation of tax jurisdiction, based on the understanding that this justification could not be invoked in cases where a Member State chose not to tax domestic funds on the income received from immovable property.

Considering these lack of justifications, the CJ therefore ruled that the aforementioned treatment of non-resident closed-end real estate funds with exclusively foreign investors under German law is against EU law.

CJ judgment on the compatibility of UK group transfer rules with the freedom of establishment (*Gallaher*, Case C-707/20)

On 16 February 2023, the CJ delivered its judgment in the case *Gallaher* (C-707/20). The case addresses the question of whether the United Kingdom (UK) group transfer rules which impose an immediate tax charge on the disposal of assets to a group company established in a third country, are restrictive of the freedom of establishment in circumstances where such a disposal would be made on a tax-neutral basis if the group company receiving the assets were resident or had a PE in an EU Member State. The case also addresses the issue of whether these rules are proportional in light of the impossibility of the company to defer the payment of this tax when it has obtained, by way of consideration for the disposal of the assets, an amount equal to their full market value.

The case concerns Gallaher (GL), a UK resident company indirectly own by a company resident for tax purposes in the Netherlands ('the Netherlands company') which is the head of the group for Europe. In addition to its UK's subsidiaries, the Netherlands company also has a Swiss subsidiary named JTISA. As a consequence of two disposals of assets made from GL to JTISA and to the Netherlands parent company, the tax authorities of the UK (HMRC) adopted two partial closure notices determining the amount of the chargeable gains and profits that accrued to GL in the context of those disposals. As the assignees were not resident for tax purposes in the UK, the gains on the assets were the subject of an immediate tax charge, as no provision of UK law provides for the deferral of that charge or for payment of the tax in instalments. GL appealed these closure notices arguing that there was a difference in treatment between the disposals of assets at issue and the disposals made between group members established in the UK, given that under the UK transfer group, the latter would be made on a tax-neutral basis, GL claimed, that the fact that it could not defer payment of the tax charge constituted a restriction on the Netherlands company's freedom of establishment or, alternatively, its free movement of capital. It further argued that the requirement to pay the tax immediately, without an option to defer payment, was disproportionate.

Following an appealed decision of a first-tier tribunal, the case was referred to the upper tribunal (Tax and Chancery Chamber) which asked the CJ whether: (i) Article 63 TFEU (free movement of capital) must be interpreted as meaning that national legislation which applies only to groups of companies falls within its scope; (ii) Article 49 TFEU (the freedom of establishment) is restricted by national rules such as those in the present case, in circumstances where the disposal of assets would be made on a tax-neutral basis if the sister company receiving the assets were resident or had a PE in an EU Member State; and (iii) whether the aforementioned rules are proportional in light of the impossibility of GL to defer the payment of this tax when it has obtained, by way of consideration for the disposal of the assets, an amount equal to their full market value.

In its ruling, the CJ first considered that a national rule applying only to groups of companies does not fall within the scope of the free movement of capital. The CJ came to this judgment by referring to existing case law showing, *inter alia*, that if national rules deal only with relations between group companies, those rules primarily affect freedom of establishment.

The CJ then considered whether the UK group transfer rules infringed the freedom of establishment. The CJ first noted that the case concerned a situation where a parent company (i.e., the Netherlands company) exercises its freedom of establishment by setting up a subsidiary in the UK (GL). The CJ then ruled that the tax liability imposed by the national rule at issue in the situation where assets are transferred by a UK resident subsidiary of a parent company established outside the UK to a third country is the same tax liability in the comparable situation of a disposal of assets by a UK tax-resident subsidiary of a parent company resident in the UK to a third country. On this basis, the CJ ultimately concluded that a national rule imposing immediate taxation on the transfer of assets from a company resident in a Member State to a sister company resident in a third country, (whereas such a transfer would take place in a tax-neutral manner if the sister company were also resident in the UK), does not constitute a restriction on the freedom of establishment within the meaning of Article 49 TFEU.

Finally, the CJ addressed the issue of proportionality in the context of GL's disposal of assets in favour of the Netherlands company. In this regard, the Court first noted that the UK group transfer rules constitute a restriction on GL's freedom of establishment because they provide for a different tax treatment between national and cross-border transfers of assets within a group of companies. Second, the Court found that difference in treatment to be justified under the need to maintain the balanced allocation of taxing powers between Member States. Finally, the Court considered the immediately recoverable tax charge without the possibility of deferring payment to be proportionate on the grounds that, first, GL did not face liquidity problems (capital gains were realised at the time of the taxable event), second, the tax authorities must ensure the tax on the capital gains realised during the period the assets are within their tax jurisdiction is paid and, last, the risk that the tax will not be paid may increase with the passage of time.

State Aid/WTO

CJ confirms Amazon and Luxembourg win in EU State Aid case (*Commission v Amazon.com and Others*, Case C-457/21 P)

On 14 December 2023, the CJ sided with Amazon and Luxembourg and dismissed the European Commission's appeal against a May 2021 judgment of the General Court that had found Amazon did not receive unlawful State aid from Luxembourg. The CJ judgment is final. We assisted Amazon on Luxembourg tax and transfer pricing aspects. The case concerned the arm's length nature of a royalty paid by a Luxembourg operating company (**LuxOpCo**) to a Luxembourg partnership (**LuxSCS**) - a tax transparent entity in Luxembourg - for the use of certain intangibles (technology, marketing-related intangibles and customer data). In a 2003 tax ruling, the Luxembourg tax authorities had confirmed the arm's length nature of the deductible royalty payments. The supporting transfer pricing analysis applied the transactional net margin method (TNMM), a one-sided transfer pricing method, with LuxOpCo as tested party. Hence, it determined an arm's length remuneration for LuxOpCo and any business income in excess of that remuneration served to pay the royalty. The European Commission disagreed and considered that LuxOpCo's tax base had been unduly reduced. The General Court in turn found errors of facts and law in the European Commission's analysis and annulled the European Commission's decision. For further background, we refer to our tax flash of 12 May 2021.

The CJ upheld the General Court's conclusions albeit on different grounds. In line with its landmark *Fiat* judgment of November 2022, the CJ considered that the OECD transfer pricing guidelines could not form part of the 'reference framework', i.e., normal taxation in Luxembourg against which a selective advantage is tested, because Luxembourg law did not explicitly refer to and implement these guidelines. Thus, the decision of the European Commission was vitiated by a fundamental error. The CJ decided that, although the General Court also relied on a wrong reference framework, it had reached the correct outcome. The CJ thus decided to directly rule in final instance and confirm the annulment of the European Commission's decision.

For more information, please see our recent web post on this case.

CJ sides with Engie and Luxembourg in tax State Aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P)

On 5 December 2023, the CJ annulled the General Court's judgment in the ENGIE State aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P). The CJ set aside the European Commission's 2018 findings that companies of the French energy group ENGIE had received unlawful State aid from Luxembourg through various tax rulings.

This landmark judgment on the European Commission's investigations of tax rulings, confirms the limits to the European Commission's use of State aid rules to challenge such rulings already outlined in the *Fiat* judgment (November 2022).

The European Commission investigated two Luxembourg financing structures set up by ENGIE. The tax rulings confirmed the deductibility of accrued, but unpaid, charges connected with a convertible loan, without (corresponding) taxable income at the level of the holder of the convertible loan. Upon conversion of the loan into shares, there was no taxation at the level of the holder of the conversion shares.

The European Commission considered that the resulting 'deduction without inclusion' outcome was not in line with Luxembourg tax rules and that ENGIE had received a selective advantage. In a first line of reasoning, the European Commission claimed that Luxembourg law did not permit deducting expenses to the extent they give rise to a corresponding exempt income at the level of the recipient (or, conversely, to exempt income that gave rise to a corresponding deduction at the level of the payer). As a result, the parent entities that were not taxed upon their disposal of the conversion shares had received an unlawful selective advantage. In a second line of reasoning, which resembles to a large extent the first one, the European Commission sought to demonstrate a selective advantage at group level. In a third line of reasoning, the European Commission argued that Luxembourg should have applied its general anti-abuse rule to reject the ruling requests and prevent the selective advantage. The General Court upheld the European Commission's decision.

The CJ set aside the General Court's judgment and annulled the European Commission's decision, rejecting all lines of reasoning. It found the decision wrongly defined the reference framework, which is the first step in assessing the existence of a selective advantage. The first line of reasoning was set aside by the CJ on the ground that the European Commission had misinterpreted Luxembourg law and adopted a wrong reference framework by referring to the general purpose of taxing all resident companies without properly assessing the wording of Luxembourg law.

As regards abuse of law, the CJ found that the General Court and the European Commission were wrong to dismiss the administrative practice of the Luxembourg tax authorities in applying this provision. It is against that benchmark that the existence of abuse should have been assessed, and not by adopting an abstract reading of the general anti-abuse rue.

For more information, please see our recent web post on this case.

AG Pitruzzella's Opinion on Irish transfer pricing rulings (*Commission v Ireland and Others*, C-465/20 P)

On 29 November 2023, AG Pitruzzella issued his Opinion in the Commission v Ireland case (C-465/20 P). The case concerns two transfer pricing rulings issued by the Irish tax authorities in favour of two group companies of Apple incorporated in Ireland, but tax resident in a different jurisdiction.

Ireland had issued two tax rulings benefiting two Irish-incorporated but non-Irish tax-resident branches of the Apple group in 1991 and 2007. Through the rulings, Ireland had approved the method proposed by the two companies to determine the profits relating to the activities of their Irish branches taxable in Ireland.

In 2016, the European Commission (EC) considered that by excluding from the tax base the profits generated by the use of intellectual property licenses held by the two branches, Ireland had granted illegal State aid to the two Apple entities. Moreover, these rulings were regarded as benefiting the entire Apple Group. The EC considered that the Irish authorities had misapplied national law by failing to use the methodologies that would have ensured an outcome at arm's length. The European Commission, therefore, ordered Ireland to recover the amount of illegal aid.

In a decision issued in 2020, the General Court annulled the European Commission's decision on the grounds that the existence of an advantage deriving from the adoption of tax rulings had not been demonstrated. In particular, the General Court considered that the European Commission had misapplied Irish law and performed an inaccurate functional analysis by presuming that the branches were performing key functions also in relation to the IP assets (given the alleged lack of capacity of the foreign head offices to perform such functions, absent employees and references to business decisions in board minutes of the head offices).

AG Pitruzzella suggested annulling the General Court's judgment and referring the case back to it for further analysis. In his view, the General Court had made several errors of law with regard to the appreciation of the European Commission's functional analysis and the interpretation of certain statements in the initial European Commission's decision. Furthermore, according to him, in the context of APAs, Irish law mandated the use of methodologies that do not result in the departure from a reliable approximation of a market-based outcome, and the Commission's approach would thus be justified. In his Opinion, AG Pitruzzella also takes a broad view of what constitutes matters of law (as opposed to matters of facts, which are not appealable before the CJ).

The decision of the Advocate General is not binding on the CJ, whose judgment is to be issued at a later date. It is worth noting that this Opinion appears to diverge from the CJ's position in the *Fiat, Amazon* and *Engie* cases as regards the proper definition of the reference framework of 'normal taxation'. In particular, AG Pitruzzella refers on several instances to the OECD transfer pricing guidelines of 2010 (which are post-dating the rulings), whereas the CJ ruled that OECD transfer pricing guidelines are irrelevant if not expressly referred to in the domestic law.

General Court's judgment on Belgian Excess Profit rulings ('EPRs') (T-131/16)

On 20 September 2023, the General Court confirmed that the tax exemptions granted by Belgium to companies forming part of multinational groups constitute an unlawful State aid.

Between 2004 and 2014, Belgium granted Excess Profit Rulings (EPRs) to Belgian entities which form part of multinational corporate groups. Those entities can benefit from an exemption of certain 'excess' profits, i.e., profits exceeding the profit that would have been made by comparable stand-alone entities in similar circumstances. These EPRs were granted to entities if they centralised activities, created employment or invested in Belgium. The rationale was that the Belgian subsidiary or branch of the multinational group should not be taxed on profits that could not have been made in Belgium if such an entity was a stand-alone entity operating under similar circumstances.

In 2016, the European Commission (EC) challenged those EPRs and found that the exemption it granted constituted unlawful State aid and ordered recovery of the identified aid.
Belgium and several companies appealed before the General Court of the European Union (the General Court) and on 14 February 2019, the General Court found that the EC had failed to prove that the EPRs constituted a 'scheme', as opposed to individual aid measures and, on that ground, annulled the EC's decision.

The EC appealed this first judgment and the Court of Justice of the European Union (the CJ) which set aside the judgment of the General Court on 16 September 2021, finding that the EC had correctly determined that the Belgian legal framework for EPRs as such qualified as State aid. The CJ, therefore, referred the case back to the General Court.

The General Court has now ruled for the second time in this case and confirmed the EC's classification of the regime as unlawful State aid. The key issue was the identification of the reference system to determine whether the EPRs deviated from the 'ordinary' Belgian tax rules. The General Court first observed that the EC did use Belgian law as reference scheme for its analysis and properly interpreted such law (despite the explanations provided by the Belgian government). In particular, the General Court took the view that Belgian law would require a prior corresponding adjustment in the other jurisdiction in order to have a downward adjustment in Belgium. The administrative practice in the EPRs was thus considered not in line with the 'ordinary' Belgian tax system.

On the criterion of advantage, the General Court considered that the EC had demonstrated that the reference system in Belgium was the taxation of all profits actually recorded by undertakings subject to taxation in Belgium, to which the deductions provided for by law are to be applied and that the EPRs resulted in an exemption not provided for by the reference system. Moreover, the General Court upheld the EC's approach, considering that given that the downward adjustments were, in the General Court's view, not in line with Belgian tax law, the rulings granted an advantage to their beneficiaries by unduly reducing their tax base. The EC did not have to quantify an advantage for each beneficiary.

On the selective nature of the regime, the General Court considered that the EC had correctly concluded that the scheme differentiated between operators who were in a comparable factual and legal situation: entities forming part of a multinational group which benefited from the excess profit exemption were treated more favourably. Other Belgian tax resident entities could not benefit from this unilateral downward transfer pricing adjustment. The scheme at issue was considered to be selective because it was not open: (i) to companies that had decided not to make new investments, centralize activities or create employment in Belgium; and (ii) to undertakings that were part of a small group (Belgium did not provide for any ruling granted to a small group).

The General Court, therefore, sided with the EC on finding that the regime was selective, as it favoured certain companies over others which were in a comparable factual and legal situation. The General Court then concluded that the scheme satisfied all of the criteria to qualify as State aid and, in the absence of valid arguments why the aid would be compatible with the internal market, considered that the scheme consisted of an unlawful State aid.

Failure to examine the defined 'normal' taxation constituting the reference framework (*P, Fachverband Spielhallen eV and LM v European Commission*, C-831/21P)

On 21 September 2023, the CJ delivered its judgment in *P, Fachverband Spielhallen eV and LM v European Commission* (Case C-831/21).

The Appellants argued that the deductibility for German corporate tax purposes of a special levy on the profits of a public casino in the region of North-Rhine-Westphalia constituted State aid. They argued that this levy was not a special tax qualifying as deductible business expense but should be treated as a non-deductible distribution of profits. The Commission and the General Court had disagreed with that stance and found that there was no selective advantage and thus, no unlawful State aid arising from the deductibility of this special levy.

The CJ annulled the judgment of the General Court. It first emphasized that for national tax measures to be considered 'selective,' the EC must identify the reference system (normal tax system) applicable in the Member State and demonstrate that the measure deviates from it, differentiating between operators in comparable situations. The CJ found that the General Court had made an error by not examining the appellants' argument concerning the identification of the reference system in the EC's decision (and, in particular, whether the special levy was validly assimilated to a deductible business expense under German corporate tax rules), as this identification is crucial for assessing selectivity and the existence of an economic advantage. The General Court was wrong to consider that the arguments raised by the Appellants could not, if upheld, vitiate the assessment of an economic advantage.

The CJ ordered the case to be referred back to the General Court for further examination, as the General Court's failure to review the EC's interpretation of German tax law (to define the appropriate reference framework for the selectivity and economic advantage analyses) precluded a final judgment by the CJ.

General Court's judgment on the Spanish tax scheme on the deduction of goodwill amortisation linked to indirect acquisitions of shareholdings in foreign companies (T-826/14)

On 27 September 2023, the General Court cancelled the European Commission's (EC) decision declaring the deduction of goodwill amortisation linked to indirect acquisitions of shareholdings in foreign companies to be unlawful State aid.

Spanish legislation allowed such deduction and, after a formal investigation, the EC had found in 2009 and 2011 that it constituted unlawful aid but recognised that some taxpayers could benefit from legitimate expectations.

In 2013, the EC reviewed what it considered to be a new (or expanded) interpretation of the tax scheme by the Spanish authorities, which also granted the deduction for amortisation of goodwill arising from indirect holdings in foreign entities through direct holdings in foreign holding companies. A year later, the EC concluded that this allegedly new, expanded interpretation was unlawful State aid and ordered recovery.

Spain and various beneficiaries of the measure challenged that decision on the ground that there was no 'new aid' and that the EC had violated the principles of protection of legal certainty and legitimate expectations.

The General Court, in its judgment of 27 September 2023, sided with the applicants and annulled the EC decision. In particular, it agreed that the allegedly new interpretation was actually already covered by the initial decisions of 2009 and 2011. The EC could not simply withdraw rights granted to Spain and beneficiaries of the scheme under these initial decisions, given that the EC, already at that time, was availed of accurate information. Thus, the EC had violated the principles of legal certainty and legitimate expectations.

In any event, even if the EC had been entitled to adopt the new decision of 2014, there would still be a violation of the principle of legitimate expectations in view of an initial public answer on the (non-aid) characterisation of the scheme given by the EC in 2006. The position of the EC in the 2014 decision should have been the same as that in the 2009 and 2011 decisions, i.e., maintaining the scheme for some taxpayers that benefited from legitimate expectations.

General Court's judgment on *Madeira's Tax Regime* (T-131/21) – Modifications incompatible with the internal market

On 21 June 2023, the General Court confirmed the special tax regime in the free trade zone of Madeira (Portugal) amounted to unlawful State aid. Initially approved in 1987, this regime was subsequently modified in 2007 and provided corporate income tax reductions and other benefits to companies engaging in activities within the region of Madeira. This version of the regime was approved in 2007 but its access was restricted to a list of activities effectively conducted in the region and excluding all financial intermediation, insurance activities, as well as 'intragroup services'. Another modified version of the regime was approved in 2013 under these same conditions.

However, in 2018, the European Commission launched a formal State aid investigation and concluded that the regime was incompatible with the internal market. Consequently, the Commission ordered Portugal to recover the granted aid and to abolish the regime. The Commission's view was further upheld by the General Court, which agreed that the regime's selective nature favoured certain companies over others, thus violating the principle of non-discrimination.

One key aspect of the General Court's judgment was the region of Madeira's standing to challenge the Commission's decision. The General Court ruled that the autonomous region had the right to challenge the decision, as it directly affected the region's autonomy and competencies. The decision resulted in the loss of vital tax advantages and in the recovery of previously granted aid, thus distinctively impacting the region.

The General Court confirmed the Commission's classification of the regime as 'new aid' instead of 'existing aid' eligible for a continuous assessment process because its actual implementation deviated significantly from the conditions set in the Commission's approval decisions of 2007 and 2013. These decisions subjected the approval of the measure to the condition that the profits of companies registered in the region be derived from activities 'actually and materially carried out in Madeira' and must contribute to job creation in Madeira. However, the regime as implemented in Madeira benefited also activities carried out outside the region by companies registered in the region. The General Court confirmed the Commission's decision and rightly pointed out that only activities affected by a disadvantage due to their location in an outermost region such as Madeira and thus incurring additional costs specific to such location should be eligible for such operating aid. Accordingly, activities carried outside those regions, which are not therefore affected by those additional costs, must be excluded from the benefit of such aid even if they are carried on by companies established in Madeira.

On the selective nature of the regime, the General Court pointed out that the regime granted tax breaks exclusively to companies registered within the free trade zone of Madeira, which must carry on certain activities exhaustively listed. It follows that only certain companies may register in the free trade zone, and it is only these companies that may benefit from the tax reduction, excluding companies registered in other parts of the region or elsewhere on the Portuguese territory. The General Court, therefore, sided with the Commission on finding that the regime was selective, as it favoured certain companies over others which were in a comparable factual and legal situation. On the reference framework for examining the selective nature of the regime, the Tribunal ruled that even if that could be the entire region, the fact that undertakings registered in Madeira but outside the free trade zone cannot benefit from that regime is sufficient to establish its selective nature.

Moreover, the General Court upheld the Commission's approach, considering that the condition of job creation in the region violated the decisions taken in 2007 and 2013. The General Court further explained that the Commission's decision was justified because the Portuguese authorities considered any type of employment as a 'job' for the application of the regime, regardless of the actual hours, days, or months of active work per year, which did not allow for the verification of the actual existence and continuity of the jobs declared by the beneficiaries. Additionally, the General Court stated that regional tax regimes based on regional development or social cohesion policies do not automatically justify measures that violate competition rules.

Regarding the principles of legal certainty and protection of legitimate expectations, the General again sided with the Commission, ruling that the recovery of illegal and incompatible State aid is a logical consequence of its illegality. The General Court dismissed arguments claiming recovery was impossible and disproportional, as alternative recovery methods could be employed.

The judgment serves as a reminder of the need to implement approved regimes as described to the Commission and, as the case may be, subject to the conditions set by the Commission.

AG Pikamäe's Opinion on State Aid qualification of German tax treatment applicable to operators of public casino (*Fachverband Spielhallen eV, LM v/ European Commission* - C-831/21 P)

On 25 May 2023, AG Pikamäe issued his Opinion in the case *Fachverband Spielhallen eV, LM v/ European Commission* (Case C-831/21 P). AG Pikamäe suggests that the CJ set aside the judgment of the General Court dismissing the appellants notably on the ground that their argumentation did not relate to the Commission's finding of absence of advantage resulting from the tax treatment of operators of public casinos, applicable in Germany.

In Germany, the law on public casinos in North-Rhine Westphalia (the Law) subjected gambling-related income to a specific tax system, whereas non-gambling-related income was subject to the German normal tax system. The Law provided that a certain portion of profits realized by the public casinos in North Rhine-Westphalia should be paid to that region's authorities (the Amount Levied). The Amount Levied was then deductible from the corporate tax and trade tax bases as a business expense, up to the amount of non-gambling related income. The appellants challenged the deductibility of the Amount Levied, as constituting a deemed State aid to the benefit of public casinos.

The European Commission ruled, in its decision of 9 December 2019, that the Amount Levied did not confer a selective advantage and decided not to initiate the formal investigation procedure, on the grounds that the Amount Levied neither qualified as a general tax on profits (like corporate income tax) nor as dividends but constituted a specific tax. As a deductible expense compliant with the German general deductibility rules, the Amount Levied could not confer a selective advantage to the public casinos. In addition, the European Commission raised that the criterion of the selective advantage was not fulfilled to the extent that the deduction of the Amount Levied reducing the public casino's corporate tax burden was outweighed by the heavier burden associated to the payment of that levy, much higher than German corporate tax and trade tax.

In a judgment issued on 22 October 2021, the General Court rejected the appeal lodged by the appellants on the grounds that they failed to prove: (i) that the elements brought before the European Commission should have given rise to doubts on whether the deductibility of the Amount Levied constituted an advantage for public casinos, and (ii) that the existence of an advantage must be assessed independently of the condition relating to selectivity. The General Court found the appellants had failed to demonstrate an advantage for the beneficiaries of the Amount Levied. Also, the General Court underlined that the criteria of advantage and selectivity in tax matters can be examined together, given that the effective taxation results from a derogation from the normal tax regime.

In his Opinion, AG Pikamäe questions that latter approach and suggests the CJ set aside the first instance judgment and refer the case back to the General Court for it to rule on the potential advantage resulting from the deductibility of the Amount Levied.

Based on the case law of the CJ, AG Pikamäe recalls that in order for a measure to be selective, the reference framework (i.e., the 'normal' tax regime) needs to be determined. This step also serves to assess the existence of an advantage, (i.e., whether the measure reduces the tax burden of the taxpayer) through an objective examination of the concrete effects of the applicable tax measure. In this respect, AG Pikamäe considers that the deductibility of the Amount Levied derogates from the German general tax regime, in that it does not constitute a special tax but a transfer or distribution of profits, and even if it were a special tax, it could not qualify as a business expense.

According to the AG Pikamäe, the General Court committed a legal error by rejecting the action brought by the appellants, by not questioning the reference framework retained by the European Commission. Such an error vitiates both the selectivity and the advantage analyses, as the normal tax regime constitutes the reference against which to assess the existence of an economic advantage. Moreover, the General Court should have considered that the determination of the reference framework necessarily requires examining the existence of an advantage in addition to the selective nature of the Amount Levied. It should, therefore, have ruled on the arguments put forward by the applicants even if it had not questioned the finding that the disputed measure was not such as to confer an advantage on its beneficiaries.

Lastly, the European Commission's finding that the economic benefit resulting from the deductibility of the Amount Levied is outweighed by the charge related to this 'specific tax' is not relevant, as solely the income and charges (including the deductibility of the Amount Levied) should have been taken into account when examining an advantage, and not the combination between the Amount Levied and the normal corporate tax system. If the European Commission's reasoning were to be endorsed, any special tax measure would be precluded from being State aid merely by demonstrating that the tax burden payable is greater than the economic benefit obtained by the taxpayer pursuant to that measure.

VAT

CJ judgment on VAT fixed establishment concept in case of exclusive toll manufacturer (*Cabot Plastics*, C-232/22)

On 29 June 2023, the CJ delivered its judgment in the case *Cabot Plastics Belgium BVBA* (C-232/22) regarding the concept of fixed establishment in the manufacturing industry.

Cabot Switzerland engaged an affiliated group company, Cabot Belgium, to provide toll manufacturing services on an exclusive basis. Cabot Belgium used its own resources and staff to transform raw materials belonging to Cabot Switzerland into finished plastic products. Cabot Belgium did not charge Belgian VAT on its invoices to Cabot Switzerland. Cabot Belgium argued that its services to Cabot Switzerland were subject to VAT in Switzerland and therefore, subject to the VAT reverse charge mechanism.

The Belgian tax administration argued that Cabot Switzerland possessed a VAT fixed establishment in Belgium by procuring the toll manufacturing services from Cabot Belgium. Their reasoning was that the Principal can exclusively be disposed of the staff and resources of Cabot Belgium under the toll manufacturing agreement. Based on this reasoning, the Belgian tax administration argued that Cabot Belgium should have charged VAT on its services to Cabot Switzerland. The Belgian tax administration imposed VAT assessments on Cabot Belgium increased by fines and interest.

The CJ ruled that Cabot Switzerland did not possess a VAT fixed establishment in Belgium. The CJ based its decision on the circumstance that Cabot Belgium remained responsible for its own resources and carried out the toll manufacturing services at its own risk. Cabot Switzerland was not able to be in possession of the human and technical resources of Cabot Belgium as if they belonged to it. The CJ further deemed relevant that the tolling services were effectively used by Cabot Switzerland in Switzerland for its business of selling goods resulting from the acquired tolling services.

CJ judgment on VAT liability relating to newly constructed real estate (*Promo 54 SA*, C239/22)

On 9 March 2023, the CJ delivered its judgement in the case *Promo 54 SA* (C239/22).

Promo 54 and Immo 2020 concluded a cooperation agreement regarding the transformation of an old school building into newly constructed residential apartments and offices. Buyers of these units concluded a purchase agreement with Immo 2020 for the land. Buyers separately concluded a contracting agreement for the renovation works with Promo 54. The transfer of the land and the realization of the new residential apartments and offices therefore, were split up from each other.

Promo 54 applied the 6% Belgian VAT rate to its contracting supplies. The Belgian tax administration disagreed by arguing that this split-contracting structure was artificial: the parties had, in fact, intended to transfer newly created residential apartments and offices. These supplies would instead have been subject to 21% Belgian VAT. This VAT treatment would then also apply to the contracting supplies of Promo 54. In order to assess whether the 21% VAT rate could apply to the services of Promo 54, it should first be established if the supply takes place before first occupation of the building. As a main rule, the transfer or real estate is exempt from VAT. An exception to this VAT exemption applies to transfers of buildings before their first occupation, which are then deemed VAT taxed. Based on Article 135(1)(j) in conjunction with Article 12(1)(a) VAT Directive, Member States are allowed to indicate in their national VAT legislation when the first occupation of a building takes place.

Promo 54 argued that Belgium did not make use of the possibility to define the conditions under which the 'first occupation' of a building is deemed present in the case of transformation of old buildings. Therefore, according to Promo 54, the Belgian tax administration could not extend the concept of 'first occupation' to a renovated building for which a first occupation had already taken place before its conversion. The referring court asked to CJ to clarify whether the exception to the VAT exemption also applies to the supply of a building which was first occupied before its transformation if the Member State has not laid down the detailed rules for applying the criterion of first occupation to conversions of buildings.

The CJ considered that although Member States are entitled to lay down the detailed rules regarding the application criterion of 'first occupation' to conversions of buildings, Member States are not authorised to alter the concept of 'first occupation' in their national laws. The CJ also stated that the concept of 'conversion of a building' implies that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of occupation of the building. Further, the CJ ruled that the supply of a renovated building can also be subject to VAT if the Member State did not lay down the detailed rules for applying the criterion of first occupation to conversions of buildings.

CJ judgment on VAT implementing regulation for electronic services platforms (*Fenix International Limited*, Case C-695/20)

On 28 February 2023, the CJ delivered its judgment in the case *Fenix International Limited* (C-695/20). This case concerns the application of the undisclosed agent regulations for persons involved in the provision of electronic services.

Fenix International is the operator of the online content platform Only Fans. Fenix collects and distributes the payments made by users to content creators that are active on the platform. Fenix withholds 20% of the remuneration paid by the user for its own services. In dispute was whether VAT was due by Fenix based on the withheld remuneration or over the full remuneration paid by the user.

The undisclosed agent provisions of Article 28 of the VAT Directive stipulate that, where a commissionaire is acting in its own name but for the account of its principal, that principal is deemed to sell its product to the commissionaire and that the commissionaire is deemed to on-sell this product to the customer. Article 9a of the VAT Implementing Regulation stipulates that a taxable person taking part in the provision of electronic services is presumed to be acting in its own name, but on behalf of the electronic service provider (unless that service provider is explicitly assigned as the person liable for VAT and this is also reflected in the various contractual arrangements).

This case concerns the validity of Article 9a of the VAT Implementing Regulation. The CJ argued that the aim of implementing measures is to provide further details on the application of a legislative act (in this case, Article 28 of the VAT Directive). This Article requires that the implementing measure complies with the essential general aims of the legislative act and that this measure does not supplement or amend the legislative act (even with regard to non-essential elements).

The CJ ruled that Article 9a of the VAT Implementing Regulation is lawful because it provides further details on when a person is considered to act in its own name, but on behalf of the provider of the electronic service. The provision in the VAT Implementing Regulation thereby respects the essential general aims pursued by Article 28 of the VAT Directive. The CJ further ruled that an online interface that has the power to charge for and define the essential elements of electronic services must be regarded for VAT purposes as the supplier of those services based on Article 28 of the VAT Directive. For this purpose, it does not matter that the customer is aware of the identity of the content creator (i.e., no undisclosed principal).

CJ judgment on VAT implications of association without legal personality (*ASA*, Case C-519/21)

On 16 February 2023, the CJ delivered its judgment in the case *ASA* (C-519/21). ASA and PP owned a plot of land in Romania. ASA and PP entered into an association agreement with BP and BM with the aim of developing residential properties on the plot of land. ASA, PP, BP and BM are natural persons. The association agreement stipulated that 33.33% and 66.67% respectively of the sales proceeds would be attributed to ASA / PP and BP / BM. All construction costs would be paid by BP and BM.

The residential properties were sold to third parties after completion of the construction process. The notarial deeds of transfer stipulated that the profits from the sale were intended to form part of the assets of ASA and PP as owners of the immovable property, without any mention being made to BP and MB or the association contract. The parties under the association agreement failed to declare VAT to the Romanian tax administration relating to the sales proceeds of the sold properties. The Romanian tax administration subsequently imposed a VAT assessment on ASA and PP (and not on the other parties to the association agreement). ASA and PP subsequently filed a civil lawsuit against BP and MB to have them ordered to pay two-thirds of the VAT debt due by ASA and PP.

The CJ ruled that BP and MB did not carry out an independent economic activity and were not considered taxable persons with respect to the supply of the properties. For this purpose, the CJ deemed relevant that, based on the contracts in place, the profits from the sale of the real estate were intended to form part of the assets of ASA and PP as owners of the immovable property. Further, the legal effects of the contracts of sale of the real estate concerned only ASA and PP.

The CJ further ruled that ASA should not be allowed a VAT credit for VAT paid by another association member in relation to the construction expenses of the partnership. According to the CJ, a taxable person who is not in possession of an invoice issued in its own name, is not entitled to input VAT deduction if he cannot prove that the goods and services concerned were actually provided as inputs by taxable persons to him for its own transactions subject to VAT.

CJ judgment on ability to uphold national VAT legislation that is contrary to EU law (*Osteopathie Van Hauwermeiren*, C-355/22)

On 5 October 2023, the CJ delivered its judgment in the case *Osteopathie Van Hauwermeiren* (C-355/22) which concerns the question of whether national courts can use a national provision to maintain effects of a law that conflicts with Council Directive 2006/112/EC on value added tax. In the case *Belgisch Syndicaat van Chiropraxie e.a.* (C-597/17), the CJ ruled that Belgium was acting contrary to EU law by reserving the VAT exemption for medical services to services provided by practitioners of a regulated medical or paramedical profession. As a consequence of this ruling, the Belgian Constitutional Court overturned the Belgian provision that non-regulated practitioners that provide medical care of a similar quality as regulated practitioners could not use this exemption. However, the Belgian Constitutional Court used its powers to uphold the effects of the provision in question, whereby the VAT exemption was denied for taxable events that occurred before 1 October 2019. According to the Belgian Constitutional Court, it was practically impossible to fix the consequences of the CJ's judgment in the case *Belgisch Syndicaat van Chiropraxie e.a.* case for transactions that took place before this date. The reason for this was that a large number of people are involved and that many claimants would not be availed of an accurate accounting system to identify the services and their value.

In the case at hand, Osteopathie Van Hauwermeiren disagreed with this approach of the Belgian Constitutional Court and asked for a refund of the VAT that was incorrectly levied on its sales of medical services. The CJ considered that it may only, and merely exceptionally and for compelling reasons of legal certainty, grant a provisional suspension of the effect of EU law on the conflicting national law. National courts are bound by a judgment rendered by the CJ under the procedure of Article 267 TFEU. The CJ also clarified again that an ordinary national court may not apply the considerations of a national constitutional court that refuses to give effect to a preliminary ruling of the CJ.

The CJ considered further that the administrative and practical difficulties in identifying those eligible for refunds cannot in themselves prove the existence of a risk of serious distortions and compelling considerations of legal certainty. The CJ therefore ruled that a national court may not give effect to the national provision that was declared incompatible by the CJ.

CJ judgment on the VAT aspects of a welcome gift (*Deco Proteste – Editores Lda*, C-505/22)

On 5 October 2023, the CJ delivered its judgment in the case *Deco Proteste – Editores Lda* (C-505/22). The case concerns the question of whether an introductory gift for taking out a magazine subscription falls within the concept of 'supply of goods for consideration' for VAT purposes.

Deco Proteste publishes magazines and other information material on consumer protection. When a consumer takes out a subscription, they receive a welcome gift with a unit value of less than EUR 50 (e.g. a tablet or smartphone). During an audit, the Portuguese tax authorities found that the invoices issued in relation to new subscriptions did not contain any reference to the welcome gifts. According to the Portuguese tax authorities, the supply of these welcome gifts for free were to subject to VAT. The purchase price formed the taxable amount subject to 23% Portuguese VAT. The Portuguese tax authorities therefore imposed a VAT assessment on Deco for around EUR 3.5 million.

The CJ ruled in its judgment that the welcome gift, offered when subscribing (again) to the magazines, is an ancillary service to the magazine subscription. According to CJ, both activities form one whole, with the subscription being the main performance and the gift being the ancillary performance whose sole purpose is to encourage the conclusion of a subscription. The CJ further ruled that the provision of such welcome gifts falls within the concept of 'supply of goods for consideration', consisting of the supply of the magazines, and does not constitute a supply of goods free of charge. This ruling of the CJ would imply that the VAT assessment should be annulled.

CJ judgment on VAT refund to customer for incorrectly charged VAT by supplier (*Michael Schütte*, C-453/22)

On 7 September 2023, the CJ delivered its judgment in the case *Michael Schütte* (C-453/22).

Schütte is a farmer who bought wood from various suppliers. These suppliers issued invoices to Schütte subject to 19% VAT. Schütte issued invoices to its own customers subject to 7% VAT. It was later established in a court case that the correct VAT rate for supplies of wood was 7% in Germany. Following this development, the German tax authorities denied Schütte the right to reclaim VAT on the purchase invoices stating that the 19% VAT was wrongfully charged. The suppliers refused to reimburse Schütte for the amount of VAT that was charged in excess of 7%, as Schütte's claim was made outside the national statute of limitation rules. The German tax authorities further denied Schütte's request for revision of the VAT amount that was wrongfully charged.
The CJ ruled that Schütte was entitled to a refund from the German tax authorities of the VAT amount wrongly charged, including tax interest in case the VAT was not refunded within a reasonable period. The CJ considered that wrongfully charged VAT should be refunded if there is no fraud, no adverse effects on the public budget have been established, and the taxpayer cannot be blamed for negligence.

CJ judgment on application of VAT margin scheme to end-of-life vehicles sold for parts (*IT*, C365/22)

On 17 May 2023, the CJ delivered its judgment in the case *IT* (C365/22).

IT purchases end-of-life vehicles and vehicle wrecks from insurance companies and resells them to third parties for spare parts without these parts having been removed.
In dispute is whether these supplies of spare parts can be considered as 'used goods' for the application of the VAT margin scheme. The Belgian tax administration argued that this is not the case because the end-of-life vehicles and vehicle wrecks, from which the spare parts were not removed at the time of the supply, were not suited for further use.

The CJ ruled that, end-of-life vehicles and vehicle wrecks that are sold as such for parts, should be considered as 'used goods' eligible for the VAT margin scheme if the parts have retained the functionalities they had when new and the sold vehicles have remained in the same economic cycle due to this reuse of parts. The VAT margin scheme would not be applicable if the vehicles had been sold to be scrapped or to be transformed into another new object.

CJ judgment on tax fines for failure to declare and pay output VAT (*SA CEZAM*, C418/22)

On 17 May 2023, the CJ delivered its judgment in the case *SA CEZAM* (C418/22).

The Belgian tax administration issued tax fines to SA CEZAM for failing to submit periodical VAT returns and, consequently, failing to declare and pay the VAT due on its supplies. These tax fines amounted to 20% of the VAT due on the sales concluded by SA CEZAM, without taking into account the right of SA CEZAM to deduct input VAT on its expenses. In dispute is whether this tax penalty is in breach of the EU law principles of proportionality and fiscal neutrality.

The CJ ruled that this specific tax fine regulation is compatible with EU law. The CJ stated that is does not appear that the tax fine, that seeks to penalize the deliberate failure to declare and pay the VAT due, goes beyond what is necessary to ensure the correct levying and collection of VAT and to prevent VAT fraud. This has to be verified by the referring Belgian court. The CJ further mentioned that the tax fine is not in breach of the neutrality principle because SA CEZAM was not denied the right to deduct the input VAT on its expenses.

CJ judgment on VAT revision obligation for written-off goods (*BTK*, C127/22)

On 4 May 2023, the CJ delivered its judgment in the case *BTK* (C127/22).

BTK offers telecommunications services. It voluntarily discarded written-off goods, such as installations, equipment or devices that were no longer fit to be used for its telecommunications services. These goods were either sold as waste or destroyed all together. BTK corrected the input VAT initially claimed in respect of these written-off goods and then asked the Bulgarian tax administration for a refund of these VAT revision payments. In dispute is whether the exemption to the VAT revision obligation for 'destruction' of (capital) goods applies to BTK.

The CJ ruled that BTK was not required to revise the initial input VAT deduction claimed both in case of waste sales and voluntary destructions of written-off goods.

CJ judgment on VAT liability of Polish Municipality for asbestos removal (*Gmina L*, C-616/21)

On 30 March 2023, the CJ delivered its judgment in the case *Gmina L* (C-616/21).

A Polish Municipality removes from its territory asbestos-containing products from residential and commercial buildings and collects asbestos-containing waste. This activity is based on a specific government program. The Municipality bears all the costs of removing asbestos from buildings eligible for the program. The Municipality engages a third party contractor to carry out the asbestos-removal activities. The contractor issues invoices including VAT to the Municipality. The Municipality claims a subsidy from the Polish government that reimburses part of the costs incurred by the Municipality.

The Municipality wished to rule the VAT consequences of the asbestos program. The Polish tax administration argued that the Municipality was a VAT taxable person and that they were entitled to reclaim the VAT charged by the contractor. The Municipality argued that it did not act in the capacity of a VAT taxable person when providing the asbestos program.

The CJ ruled that the Municipality does not provide a VAT taxable service when removing and collecting asbestos-containing products and waste from homes. To reach this outcome, the CJ deemed relevant that the asbestos activities were not aimed at obtaining sustainable income, that the building owners did not have to pay any remuneration to the Municipality and that the operations were financed from public funds.

CJ judgment on VAT liability of Polish Municipality for renewable energy sources (*Gmina O*, C-612/21)

On 30 March 2023, the CJ delivered its judgement in the case *Gmina O* (C-612/21).

Another Polish Municipality is involved with three other municipalities in a project to install systems for renewable energy sources. The real estate owners on which the installations are placed will pay a contribution of 25%

of the costs to the Municipality. The remaining 75% is reimbursed by public funds designated for the transition to a low-carbon economy.

The Municipality wished to rule the VAT consequences of the renewable energy program. The Polish tax administration argued that the Municipality was a VAT taxable person. The Municipality argued that it did not act in the capacity of a VAT taxable person when providing the renewable energy program.

The CJ ruled that the Polish Municipality does not provide a VAT taxable service when supplying and installing renewable energy sources. To reach this outcome, the CJ deemed relevant that the Municipality indicated in its ruling request that this activity is not aimed at obtaining sustainable income, that the customers pay only a quarter of the costs incurred and the remaining balance is financed from public funds. The CJ also argued that the fact that this proposition was not 'economically viable' indicated that the Municipality did not provide a VAT taxable service.

CJ judgment on whether precluding the submission of evidence after a tax assessment notice is against EU law (*NEC Plus Ultra Cosmetics AG*, C-664/21)

On 2 March 2023, the CJ ruled in the case *NEC Plus Ultra Cosmetics AG* (C-664/21). The case deals with the issue of whether Slovenia's law on tax procedure, which places conditions on the submission of evidence in tax appeals, is in line with EU principles of effectiveness and proportionality.

NEC Plus Ultra Cosmetics AG (NEC) is a company established in Switzerland, which supplies cosmetic products to customers in Croatia and Romania. During 2017, a purchaser in Croatia took control of purchased goods from a Slovenian warehouse and transported them to another Member State. The goods later received an exemption from VAT payment for the supply of goods within the territory of the European Union for intra-Community transactions.

In February 2019, the Slovenian tax authority asked NEC to submit all documents related to the supplies in question. At the time, NEC claimed it did not possess all the documents because its office in Germany, which was responsible for Croatian deliveries, had closed in August 2018. NEC said it was making an effort to retrieve any relevant documents. It later provided the tax authorities with the requested documents.

An additional tax liability was levied against NEC for underpaid VAT in 2017 following a tax assessment notice from the tax authority, which found that NEC did not properly demonstrate through its documentation that the goods were actually transported to another Member State. In doing so, the tax authority 'did not take into account the evidence submitted after the report was issued, on account of the evidence having been submitted late,' the Court explained.

After several appeals the Supreme Court of Slovenia requested a preliminary ruling from the CJ on whether the principles of tax neutrality, effectiveness, and proportionality should preclude the Slovenian legislation, which sets conditions and dates for a supplier of goods to submit evidence in administrative or judicial proceedings that are not included in the VAT Directive (2006/112).
The CJ explained that VAT exemptions can be denied under some circumstances, including when the taxpayer is late in submitting evidence 'after several unsuccessful reminders from the tax authorities and when the procedure was already at a contentious stage.' But it also noted that when 'the tax authority refuses to grant a taxable person the benefit of an exemption from VAT at an early stage of the tax procedure, it must ensure strict compliance with the principle of tax neutrality.' A refusal to take evidence into account, before imposing a tax assessment, must in this respect be based on particular circumstances such as the absence of any justification for the delay or a loss of tax revenue caused by the delay.

The court stated that national legislation which does not allow the taxable person to provide evidence which is still outstanding, in order to substantiate the right which, he or she claims and which does not take account of any explanations as to why that evidence was not provided earlier thus appears difficult to reconcile with the principle of proportionality and also with the fundamental principle of VAT neutrality. Further, such a refusal to take into account evidence is capable of making it excessively difficult to exercise the rights conferred by EU law. The Court then ruled that the referring court must determine whether or not the refusal to take those factors into account complies with the principle of effectiveness.

Based on the above, the CJ found that Articles 131 and Article 138(1) of the VAT Directive (2006/112), read in conjunction with the principles of tax neutrality, effectiveness and proportionality, must be interpreted as not precluding national legislation which prohibits the production and gathering of new evidence which establishes that the substantive conditions laid down in Article 138(1) of that Directive are satisfied, during the administrative procedure which resulted in the adoption of the tax assessment notice, in particular after the tax inspection stage but before the adoption of that decision, provided that the principles of equivalence and effectiveness have been complied with.

CJ judgment on Hungarian implementation of the VAT bad debt relief scheme (*Euler Hermes SA Magyarországi Fióktelepe*, Case C-482/21)

On 9 February 2023, the CJ delivered its judgment in the case *Euler Hermes SA Magyarországi Fióktelepe* (C-482/21).
Euler Hermes is a Hungarian insurance company.
Euler Hermes is involved in the business of procuring trade receivables from its policyholders. Euler Hermes purchases trade receivables for 90% of the unpaid amount including the applicable VAT. All rights and obligations relating to the receivables are then assigned to Euler Hermes. When a debtor remained in default and the underlying receivable was deemed uncollectible for VAT purposes, Euler Hermes applied for a refund of VAT paid by the policyholders to the Hungarian tax administration. This VAT refund was denied by the Hungarian tax administration based on the argument that the right to apply for a VAT refund is vested in the taxable person whose receivable has become definitively irrecoverable and who has declared the VAT.

The CJ ruled that Hungary is not in violation of EU VAT law by not granting Euler Hermes a VAT refund for VAT paid by its policyholders. The CJ considered that the consideration for a supply can also be obtained from a third party. Since Euler Hermes paid the policyholders 90% of the amount of the debts at issue (including VAT), the CJ ruled that this part of the compensation had therefore been paid and can no longer be subject to VAT relief based on 'non-payment' within the meaning of Article 90 (1) of the VAT Directive. The CJ also considered that Euler Hermes was not the taxable person entitled to a VAT bad debt relief in respect of the sales.

AG Kokott's Opinion on VAT liability for fake invoices for fictitious transactions (*P sp. z.o.o.*, C-442/22)

On 21 September 2023, AG Kokott of the CJ issued her Opinion in the case *P* (C-442/22).

P is a VAT taxable person with 14 employees. During 2010 and 2014, an employee of P issued fake invoices for almost 1500 fictitious transactions. These sales invoices were issued in the name of P. The Polish tax authorities argued that P, in its capacity as employer, had failed to exercise due diligence in preventing the issuance of the fake invoices and consequently held P liable for the VAT wrongfully charged on the fake invoices.

The CJ ruled that P can indeed be held liable for the fake invoices issued by one of its employees if:

- The recipient of the invoice could not be refused deduction of the VAT charged on fake invoices,
- The issue of the invoices by the employee is attributed to P on account of responsibility, and
- P itself did not act in good faith.

AG Kokott concluded that good faith is not present when the ostensible issuer of an invoice is himself at fault.
A taxable person may also be deemed to have been at fault if it can be attributed to him that he has failed in the selection or supervision of employees.

AG Kokott's Opinion on VAT position of Board of Director activities (*TP*, C-288/22)

On 13 July 2023, AG Kokott of the CJ issued her opinion in the case TP (C-288/22).

TP is a natural person who is a member of the Board of Directors for various companies in Luxembourg.
The Luxembourg tax authorities argued that TP is a VAT taxable person and that, therefore, VAT is due on the remuneration it receives. TP argued that he does not perform its work independently and that, therefore, his remuneration is not subject to VAT.

AG Kokott concluded in her Opinion that TP should not be considered a VAT taxable person that performs an independent economic activity. This conclusion is based on a 'typological approach', whereby she compared the activities of TP against the 'standard' characteristics of a VAT taxable person, such as bearing economic risks and acting for his own risk and account. For example:

- The remuneration received by TP was not for his own activities, but as part of a collective body and accordingly, there was no independent assumption of risks by TP.
- The activities performed by TP could only benefit the company for which it was appointed and thus lacked own economic initiative.
- The remuneration received by TP was not determined by means of negotiation but rather by another body of the company.
- TP participated in the success of the company in the same way as a shareholder, which cannot be considered equivalent to bearing own economic risks.

CJ judgment on whether director fees are subject to VAT (*TP*, Case C-288/22)

On 21 December 2023 the Court of Justice of the European Union (CJEU) delivered its final judgment in the TP Case (C-288/22) on the question whether a member of the board of a Luxembourg SA (Director) should have invoiced his director fees with VAT.

The CJEU considers that even though in the case at hand the Director is performing an economic activity, the independency as required by the VAT Directive is missing as the Director does not bear the personal economic risk associated with his decisions and activity. As a consequence, the Director fees are not subject to VAT.

More details will follow in our next edition.

Customs Duties, Excises and other Indirect Taxes

European Parliament and Council adopt the Carbon Border Adjustment Mechanism (CBAM) Regulation

On 10 May 2023, the Carbon Border Adjustment Mechanism (CBAM) Regulation was signed by the European Parliament and Council. The CBAM Regulation was published in the EU Official Journal on 16 May 2023 and officially entered into force on 17 May 2023.

The CBAM Regulation will be implemented gradually, starting with a transitional phase on 1 October 2023. During this phase, importers will only need to report greenhouse gas emissions from their imports without any financial obligations. The information gathered during this phase will be used to refine the CBAM methodology. By mid-2025, the European Commission will evaluate the regulation's application and determine the final methodology. The permanent CBAM system is expected to be enforced on 1 January 2026, requiring importers to declare the quantity of goods imported along with corresponding greenhouse gas emissions. They will have to surrender CBAM certificates calculated based on the auction price of EU ETS allowances. The phasing-out of free allocation of GHG allowances under the EU ETS will align with the implementation of CBAM.

Following the adoption of the Regulation, on 13 June 2023 the EU Commission published a draft implementing regulation laying down reporting obligations for the purposes of CBAM during the transitional period. The draft was opened for feedback until 11 July 2023.

For more information on the CBAM Regulation including its key takeaways and how your business can prepare for the transitional period starting on 1 October 2023, please see our Tax Flash on this topic.

EU Commission publishes proposal for an ambitious and comprehensive reform of the EU Customs

On 17 May 2023, the European Commission published the proposal for an ambitious and comprehensive reform of the EU Customs Union. The European Commission considers these reforms necessary to create an agile and future-proof Customs Union, ready for increased trade volumes and digital transitions. Key changes of the Customs reform proposal include designating digital platforms as 'deemed importers' and shifting the responsibility to these platforms for paying applicable customs duties as well as ensuring compliance with new procedural and legislative requirements.

As part of the plan to simplify and modernize customs procedures, the European Commission has proposed the following key changes:

- An EU Customs Data Hub will be established. The EU Customs Data Hub is a single EU interface where traders can submit customs data. When implemented, traders will only have to deal with one IT system and one set of procedures
- An EU Customs Authority will be established to mitigate the risks of circumvention and fraud. The EU Customs authority will become responsible for

conducting the EU risk management and coordinating operational crisis management
- The concept of a 'Trust and Check' trader will be introduced. These traders need to provide real-time data on the movement of their consignment. In return, these traders benefit from reduced administrative burdens and simplified customs formalities
- The introduction of a modernized and more transparent approach to e-commerce import processes. Digital platforms will be considered deemed importers and must report e-commerce sales to customs
- The customs duty exemption for goods up to EUR 150 will be abolished. E-commerce business can opt to use the simplified tariff treatment for calculating the customs duties for low value goods

For more information on this initiative, please see our dedicated web post.

CJ judgment on national legislation providing for an administrative fine corresponding to 50% of the shortfall in customs duties (*J.P. Mali*, C-653/22)

On 23 November 2023, the CJ delivered its judgment in the case of *J.P. Mali* on the validity of national legislation providing for an administrative fine of 50% of the shortfall in customs duties resulting from the failure to comply with customs legislation.

In 2017 and 2018, J.P. Mali Kft., a company established in Hungary, released bicycles and bicycle parts for free circulation ('importation') in the customs territory of the EU. The products were purchased from companies established in Taiwan and the customs representative of J.P. Mali submitted import declarations stating that these products also originated in Taiwan. However, the customs authorities found that the products actually originated in China, resulting in the post-release levy of anti-dumping duties for an amount of approximately EUR 70,000.

In addition, in accordance with national legislation, an administrative fine of 50% of the shortfall in customs duties (approximately EUR 35,000) was imposed on J.P. Mali.

J.P. Mali disputed this and argued that an administrative fine of 50% of the shortfall in customs duties was disproportionate to the seriousness of the offence, taking into consideration the fact that importers only have limited information on the production and origin of the products and therefore have to rely on the information provided by the exporters. J.P. Mail was of the view that the Hungarian legislation does not take this into account as it should.

Article 42(1) of Regulation 952/2013 ('UCC') requires EU Member States to provide for effective, proportionate and dissuasive penalties in cases where importers fail to comply with customs legislation, irrespective of whether the non-compliance was intentional, negligent or absent of any wrongful conduct on the part of the economic operator concerned. EU Member States are empowered to choose the penalties which they consider to be appropriate, provided that they are proportionate and do not go beyond what is necessary in order to attain the objectives legitimately pursued by the customs legislation.

The CJ considered that an administrative fine of 50% of the shortfall in customs duties is likely to encourage economic operators to take all necessary measures to ensure that the information they provide in customs declarations is correct and complete, thus ensuring that the penalties are effective and dissuasive.

In addition, the CJ considered that the national legislation resulted in administrative fines which are directly proportionate to the amount of the shortfall in customs duties caused by the infringement. When the shortfall is low, the amount of the administrative fine is reduced. Furthermore, the CJ does not consider the rate of 50% to appear excessive in light of the importance of the objectives of EU customs legislation.

Lastly, the national legislation allows for the conduct of the economic operator to be taken into account. For example, if the shortfall in customs duties is due to fraudulent activities, the rate of the administrative fine is increased to 200%. If the economic operator acts in good faith and requests an amendment of the customs declaration by supplying the correct information, the rate of the administrative fine is reduced to 25%. The national legislation thus distinguishes between cases where the economic operator has acted in good faith and cases where he has not.

In conclusion, the CJ ruled that Article 42(1) UCC does not preclude national legislation which provides for administrative fines equal to 50% of the shortfall in customs duties caused by the supply of incorrect information in a customs declaration, and which are imposed notwithstanding the good faith and precautions taken by the economic operator concerned.

CJ judgment on the primary rules of origin where the production of goods involves more than one country or territory (*Stappert Deutschland GmbH*, C-210/22).

On 21 September 2023, the CJ delivered its judgment in the case *Stappert Deutschland GmbH*. The main question concerns the validity of the criterion for determining non-preferential origin relating to goods falling under the Harmonised System ('HS') subheading 7304 41, included in Annex 22-01 to Delegated Regulation (EU) 2015/2446 ('DA').

Tube blanks (of HS subheading 7304 49) from China were sent to South Korea, where they were cold-rolled and drawn into stainless steel pipes and tubes (of HS subheading 7304 41). The core issue was whether these imported stainless steel pipes and tubes obtained non-preferential origin in South Korea. Anti-dumping duties, namely, were to be levied on imports of tube blanks falling under HS subheading 7304 49 with Chinese non-preferential origin.

According to the applicant, the last economically justified stage of substantial transformation took place in South Korea and determines the origin, in accordance with Article 60(2) of the Union Customs Code ('UCC'). However, according to the German customs authorities, the workings in South Korea did not confer non-preferential origin, as the primary rule of in Annex 22-01 DA was not met.

As a general rule set out in Article 60(2) UCC, goods whose production involves more than one country or territory originate in the country or territory where they underwent their last substantial and economically justified processing or working, resulting in the creation of a new product or constituting an important stage in the manufacturing process ('substantial transformation'). Annex 22-01 contains the explanatory rules on the last substantial transformation for several tariff classification codes. Notably, for products classified with HS subheading 7304 41, the primary rule includes a change from hollow profiles of subheading 7304 49.

Under that criterion, the cold forming of hollow profiles from HS code 7304 49 to HS code 7304 41, constitutes a substantial transformation, as cold forming brings irreversible changes to their physical, mechanical and metallurgical properties. However, the cold forming of a tube or a pipe, also falling within HS subheading 7304 49, does not determine the origin of the finished product under this rule.

The European Commission has not provided any convincing justification for objectively explaining that difference in treatment between stainless steel pipes or tubes, on the one hand, and hollow profiles, on the other, all of which fall under HS subheading 7304 41 and were obtained from products falling under HS subheading 7304 49.

According to the CJ, the European Commission is empowered to adopt delegated acts laying down the rules according to which goods are considered to have undergone their last, substantial and economically justified processing or working. However, it cannot, in the absence of objective justification, adopt entirely different solutions for similar working and processing operations.

The CJ, therefore, ruled that the primary rule included in Annex 22-01 DA is invalid as it excludes given operations from conferring on a product the status of product originating in the country where those operations took place, whereas analogous operations determine the acquisition of origin for similar products.

In conclusion, the CJ decided that the primary rule is invalid given that it excludes the change of tariff heading resulting from the transformation from tubes and pipes under HS subheading 7304 49 into seamless tubes, pipes and hollow profiles of iron or steel, cold-drawn or cold-rolled (cold reduced) under HS subheading 7304 41, from conferring on those products the status of products originating in the country where that change took place.

CJ judgment regarding the excise duty suspension arrangement owing to an unlawful act solely attributable to a third party (*KRI SpA*, C-323/22).

On 7 September 2023, the CJ delivered its judgment in the case *KRI SpA* ('KRI') (C-323/22) regarding the interpretation of the first sentence of Article 14(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 2004/106/EC of 16 November 2004 ('Excise Directive').

KRI, a company established in Italy, operates a business for the storage and transport of petroleum. In its capacity as authorised warehouse keeper, KRI made, from its tax warehouse situated in Italy, 196 consignments of mineral oils under an excise duty suspension arrangement to BMB Projekt d.o.o, a company established in Slovenia that was authorised as a registered warehouse keeper to receive these products.

For the purposes of movement under an excise duty suspension arrangement, KRI drew up, for each consignment, an accompanying administrative document (‘AAD’). An audit carried out by the Italian Customs Authorities showed that the AAD contained falsifications and that it was not proven that the mineral oils had been released for consumption outside the Italian territory. Being unable to determine the place where the mineral oils had irregularly been released for consumption, those authorities also considered that those irregularities had been committed within Italian territory.

In those circumstances, they decided that it was for the Italian State to recover the excise duties due on the mineral oils. KRI disagreed with the recovery of the excise duties because the falsification of documents was attributed solely to illegal acts by a third party.

In those circumstances, the Italian Supreme Court of Cassation decided to stay the proceedings and to refer to the CJ for a preliminary ruling whether the first sentence of Article 14(1) Excise Directive must be interpreted as meaning that the exemption from tax that it lays down in respect of losses occurring under a suspension arrangement as a result of fortuitous events or force majeure applies to the authorised warehouse keeper, which is liable for the payment of duty, in the case of a departure from the suspension arrangement owing to an unlawful act solely attributable to a third party, where the warehouse keeper was wholly uninvolved in that unlawful act and where it had a legitimate expectation that the products moved in accordance with the rules under the arrangement for the suspension of duty.

The wording of the first sentence of Article 14(1) Excise Directive indicates that the warehouse keeper is exempt when two conditions are met. First, there must be a ‘loss’ that occurred under the suspension arrangement. Second, this ‘loss’ must be due to fortuitous events or force majeure.

According to the CJ, a ‘loss’ of a product which is under a suspension arrangement can mean only the material impossibility for that product to be released for consumption, or even to enter into commercial channels of the European Union. However, a product which, in circumstances such as those in this proceeding, departs irregularly from a suspension arrangement nevertheless remains within the commercial channels of the European Union.

In conclusion, the CJ ruled that the exemption from tax, as per the first sentence of Article 14(1) Excise Directive, does not apply to a warehouse keeper, even when a departure from the suspension arrangement is due to an unlawful act solely attributable to a third party. This holds true even when the warehouse keeper was entirely uninvolved in the unlawful act and had a legitimate expectation of compliance with suspension arrangement rules.

CJ judgment on whether refund rights on tax prohibited under EU law may be transferred (*KL, PO v Administrația Județeană a Finanțelor Publice Brașov*, Case C-508/22)

On 28 September 2023, the CJ delivered its judgment in the case *KL, PO v Administrația Județeană a Finanțelor Publice Brașov* (C-508/22) on whether refund rights on a tax on motor vehicles prohibited under EU law may be transferred by the taxable person who paid that tax to a subsequent purchaser of the vehicle.

The CJ judgment was delivered in the context of proceedings between, on the one hand, KL and PO, as the heirs of AX, and, on the other, the District Finance Administration, Brașov, Romania (the ‘tax authority’). It concerned the reimbursement of a special registration tax on passengers cars and motor vehicles, which was levied in breach of EU law at the time of the first registration of a vehicle, to a subsequent purchaser of that vehicle.

In the case, two questions were referred to the CJ. First, whether Article 110 TFEU must be interpreted as meaning that the amount of a tax levied, in breach of EU law, by a Member State on motor vehicles at the time of first registration may be incorporated in the value of those vehicles, with the result that the claim against the State on account of the unlawful levying of that tax is considered to have been transferred, upon the sale of those vehicles, to subsequent purchasers thereof. Second, whether the same provision referred to above, must be interpreted as precluding national legislation which provides that the aforementioned tax levied by a Member State, can be refunded only to the taxable person who paid that tax, and not to a subsequent purchaser of the vehicle in question.

Regarding the first question, the CJ noted that even though indirect taxes in commerce are normally passed on in whole or in part to the final consumer, it cannot be generally assumed that the charge is actually passed on in every case. On such basis, it understood that it is for the national court to assess, on the basis of the circumstances of the case before it, whether the tax has actually been passed on in whole or in part to any of the subsequent purchasers. The Court noted that in so far as the national court finds that the tax was actually passed on to the subsequent purchaser, there is nothing, in principle, to preclude a finding that the claim against the State on account of the unlawful levying of that tax was transferred, along with the right of ownership of the vehicle, to the purchaser. It therefore replied to the first questions by stating that that Article 110 TFEU must be interpreted as meaning that the amount of a tax levied, in breach of EU law, by a Member State on motor vehicles at the time of their first registration may be incorporated in the value of those vehicles, with the result that the claim against the State on account of the unlawful levying of that tax is considered to have been transferred, upon the sale of those vehicles, to the subsequent purchasers thereof.

Concerning the second question, and reflecting on existing case law and principles governing the refund of taxes levied in breach of EU law, the CJ understood that Article 110 TFEU must be interpreted as not precluding national legislation which only allow the refund to the taxable person (and not to a subsequent purchaser), provided that the purchaser who actually bore the burden of that tax may, in accordance with detailed national procedural rules, obtain the reimbursement thereof from the taxable person who paid the tax or, if necessary, from the tax authorities, where, in particular, repayment by that taxable person proves impossible or excessively difficult.

CJ judgment on the application of stamp duty to financial intermediation services fees in connection with placement of securities (*A, S.A. v Autoridade Tributária e Aduaneira*, Case C-335/22)

On 19 July 2023, the CJ delivered its judgment in the case *A, S.A. v Autoridade Tributária e Aduaneira* (C-335/22), which concerns the question of whether the imposition of a stamp duty on investment services provided by a bank to a company in relation to marketable securities in the form of bonds and commercial papers is precluded by Article 5(2)(b) of Council Directive 2008/7/EC.

The aforementioned provision expressly prohibits, in any form whatsoever, the indirect taxation of loans contracted in the form of the issue of bonds or other negotiable instruments irrespective of the issuer, and all the formalities relating thereto, as well as the creation, issuance, admission to the stock exchange, putting into circulation or trading of those bonds or other negotiable securities.

A is a Portuguese banking institution which is also active in the financial intermediation sector. Between 1 September and 31 December 2018, as part of its activity, A participated, as a financial intermediary, in several transactions for the issuance of transferable securities in the form of marketable securities, such as bonds and commercial papers, by providing market placement services for those securities to eight trading companies. For those placement services, A received commissions on the basis of which it assessed and paid to the State a stamp duty. Taking the view that stamp duty was not payable on those placement fees, A brought an action before the Tax Arbitration Tribunal of Portugal, which referred the case to the CJ, which was asked whether Article 5(2)(b) of Directive 2008/7 must be interpreted as precluding national legislation which provides for the imposition of stamp duty on the remuneration which a capital company pays to a banking institution to which it has entrusted the placement on the market of negotiable securities such as securities such as securities bonds and newly issued commercial paper.

In its judgment, the CJ first held that the services of placing negotiable securities such as bonds and newly issued commercial paper on the market are closely linked to and a necessary step of the transactions of issuing and putting into circulation those securities within the meaning of Article 5(2)(b) of Directive 2008/7. Therefore, in the Court's view, they must be regarded as forming an integral part of an overall transaction in the light of the capital raised in question. Furthermore, the CJ noted that, it is irrelevant, for the purposes of this provision, that it was chosen to entrust the market placement transactions to third parties rather than to carry them out directly.

In the light of the foregoing considerations, the CJ concluded that Article 5(2)(b) of Directive 2008/7 must be interpreted as precluding national legislation which provides for the imposition of stamp duty on the remuneration which a capital company pays to a banking institution to which it has entrusted the placement on the market of negotiable securities such as bonds and newly issued commercial paper, regardless of whether the companies issuing the securities in question are legally obliged to use the services of a third party or have chosen to use them voluntarily.

CJ judgment on the requirement of the guarantor to pay a customs debt if the amount of duty has not been duly communicated to the debtor (C-358/22).

On 9 March 2023, the CJ delivered its judgment in the case of Bolloré logistics SA ('Bolloré logistics) (C-358/22). This case concerns the requirement of Bolloré logistics, in its capacity as guarantor, to pay an amount corresponding to a customs debt, if this customs debt has not been duly communicated to the customs debtor.

The customs debtor, BPC, had been granted an authorisation for the customs warehousing procedure. Later on, the French customs authorities cancelled the authorisation and notified BPC of the customs debt resulting from the ineffectiveness of that procedure.
On 9 March 2016, the authorities notified BPC of a final decision establishing a customs debt and an invitation to pay. However, it was not until 21 March 2016, that it booked ('entry in the accounts') the amount of that debt.

On 21 March and 21 June 2016, it also notified Bolloré logistics, in its capacity as guarantor, of two recovery notices relating to the amounts of customs duties guaranteed.
Article 221 CCC prescribes that, as soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures. In the present case, that requirement was not met and therefore, the recovery notice to BPC was annulled and all the claims of the customs authorities against BPC were dismissed by the French court of appeal.

However, the referring French court was uncertain whether the failure to lawfully communicate the duty to the debtor, constitutes a personal exception for that debtor on which the guarantor (i.e., Bolloré logistics) cannot rely, or whether the customs debt is payable by the guarantor only if it is payable by the debtor?

The CJ considered that a contract of a guarantee represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the debtor if that debtor fails to fulfil them himself. The obligation created is accessory in, amongst others, the sense that the obligation assumed by the guarantor cannot be more extensive than that of the debtor. Furthermore, it should be borne in mind that Article 195 CCC states that the guarantor is to undertake in writing to pay jointly and severally with the debtor the secured amount of a customs debt 'which falls to be paid'.

In the current case, the customs debt does not fall to be paid by the debtor in the absence of a prior entry in the accounts of the amount of customs duty without which the communication of that amount to the debtor is not lawful. It is the decision of the CJ that the guarantor cannot be required to guarantee payment of that debt when it has not become payable to the debtor.

AG Richard de la Tour opines on the amendment or invalidation of a customs declaration where an excess quantity of goods is discovered after release of the goods (*SC Zes Zollner Electronic SRL*, C-640/21).

On 23 January 2022, the AG delivered his Opinion in the *SC Zes Zollner Electronic SRL* ('ZZE') case (C-640/21). This case concerned the legal means available under the Union Customs Code ('UCC') to correct a clerical error whereby an excess quantity of goods is discovered that has not been declared with the customs authorities, without incurring administrative or criminal penalties.

Upon taking delivery of a consignment at its premises, ZZE, in short, discovered that it had received 10,000 electronic integrated circuits, whereas only 5,000 electronic integrated circuits had been declared for release for free circulation ('import') with the border customs office of Romania.

ZZE requested to remedy the detected irregularity with the Romanian customs authorities and calculate the associated customs liability. The Romanian authorities, however, issued a report declaring that ZZE had intentionally removed goods from customs supervision. In accordance with Romanian law, the authorities imposed a penalty consisting of a fine and the obligation to pay a sum corresponding to the value of the excess goods to ZZE.

ZZE appealed against the case bringing forward, among others, that it had itself brought the matter to the attention of the authorities and that the goods had not actually been removed from customs supervision, but only that a simple clerical error had occurred.

The Romanian Court subsequently asked the CJ whether it was possible to amend or invalidate the customs declaration to correct the error made by ZZE whereby no penalties would be issued as this was not clear for the Romanian Court.

The AG considered that an amendment of the customs declaration via Article 173 UCC is only allowed in the case it does not concern goods other than those which it originally covered. The AG concluded that the excess quantity does not concern 'other goods', as the goods are classified in the same tariff heading as the goods covered by the customs declaration and could have been covered by a single customs declaration if a clerical error had not been made.

Furthermore, the AG concluded that the amendment can take place after release of the goods, in so far as the request to amend the customs declaration is accompanied by information allowing a connection to be made between that excess quantity and the import documents and where any suspicion of fraud is ruled out.

It is the AG's view that, as the excess goods have already been imported into the EU in the same consignment as the other identical goods, amending the customs declaration to add that quantity of goods enables the declarant to comply with the obligations relating to the placing of all the goods under the customs procedure concerned.

With regard to the invalidation of a customs declaration, the AG concluded that Article 174 UCC does not permit a customs declaration to be invalidated in order to include an excess quantity of goods once the goods have been released. Article 174 UCC only applies in specific cases and the current situation is not provided for.

Lastly, the AG concluded that the penalty in this case goes beyond the limits of what is necessary to ensure, inter alia, that the goods are not removed from customs supervision. It undermines the objective of combating fraud and protecting the EU budget, as it would deter application of the regulations and would encourage the concealment of any excess quantity of, erroneously, undeclared goods. Furthermore, in such a situation and in the absence of any risk of fraud, it does not comply with the principal of proportionality as set out in Article 42 UCC and Article 49(3) of the Charter of Fundamental Rights.

It is now up to the CJ to consider and deliver its judgment.

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